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Pleading: Cross Complaint: Actions to Quiet Title.—Where a defendant seeks affirmative relief depending upon the contract or transaction upon which the action is brought he may file a cross complaint.¹ In actions to quiet title and in other actions where the plaintiff calls on the defendant to set up his adverse interest the answer is equivalent to a cross complaint; affirmative relief can be given on the answer; a cross complaint simply encumbers the record with a superfluous pleading and will be stricken out on motion,² except in the cases where a cross complaint is necessary to bring in new parties or for some special reason.³ Where affirmative relief is asked for in a cross complaint or answer the plaintiff can not dismiss the action without the defendant's consent.⁴

These rules are well designed to effect an orderly, complete yet simple disposition of the controversy, but the courts are persistently invoked to apply them to the obstruction of justice. Such abuse has not been sanctioned by the courts. It has been decided:

1. After a case has been litigated on the theory that a pleading called an answer or counterclaim is really a cross complaint and all the issues which would have been presented by a formally labelled cross complaint have been actually determined, the judgment will not be reversed for want of a cross complaint.⁵

2. On the other hand before a trial on the merits the court will not permit a defendant to take a default for failure to answer a cross complaint unless the pleading is distinctly labelled a cross complaint; nor after a judgment for plaintiff on the merits can the defendant obtain a judgment on the pleadings under such circumstances.⁶

3. In the special case of quiet title suits, where a cross complaint is unnecessary, the court has recently decided that the plaintiff is not in default for failure to answer the superfluous pleading.⁷

¹ Code of Civil Procedure, California, sec. 442.

² *Kitts v. Austin*, (1890) 83 Cal. 167, 23 Pac. 290; *Miller v. Luco*, (1889) 80 Cal. 257, 22 Pac. 195; *Mills v. Fletcher*, (1893) 100 Cal. 142, 34 Pac. 637; *Hibernia etc. Soc. v. London etc. Ins. Co.*, (1903) 138 Cal. 257, 71 Pac. 334. The suggestion that a cross complaint is proper made in *Kellar v. McGilliard*, (1907) 5 Cal. App. 395, 90 Pac. 483 does not necessarily follow from the judgment in *Islais Water Company v. Allen*, (1901) 132 Cal. 432, 64 Pac. 713.

³ *Winter v. McMillan*, (1890) 87 Cal. 256, 25 Pac. 407, 22 Am. St. Rep. 243.

⁴ Code of Civil Procedure, California, sec. 581; *Islais etc. Water Company v. Allen*, (1901) 132 Cal. 432, 64 Pac. 713. The opinion in *Brannan v. Paty*, (1881) 58 Cal. 330 is based upon section 581 of the Code of Civil Procedure prior to its amendment 1877-78.

⁵ *Gregory v. Bovier*, (1888) 77 Cal. 121, 19 Pac. 732.

⁶ *McAbee v. Randall*, (1871) 41 Cal. 136; *Shain v. Belvin*, (1889) 79 Cal. 262, 21 Pac. 747; *Cohn v. Kelly*, (1901) 132 Cal. 468, 64 Pac. 709; *Rodgers v. Peckham*, (1898) 120 Cal. 238, 52 Pac. 483.

⁷ *Brooks v. White*, (2nd App. Dist. Sept. 10, 1913) 17 Cal. App. Dec. 289.

4. Where the answer in a quiet title suit does not ask for an affirmative judgment but a cross complaint does, it seems that a motion to strike out the cross complaint in order to dismiss the action will not be granted; and of course going to trial without objection to a superfluous cross complaint is a waiver of any right that may exist to complain on that ground.⁸

The perversion of rules of pleading for the purpose of preventing or of overthrowing a judgment on the merits has been aptly characterized as their "nuisance" use. If the refusal of courts to allow an advantage from this "nuisance" use does not sufficiently discourage practitioners from raising such points, the courts should prescribe some more effective penalty. A justice of a state court afterwards a member of the United States Supreme Court, once said: "I never allow a lawyer to argue a question of pleading in my court. I ask him what his right is and if he hasn't any I will not let him proceed." Pleading is no longer an end in itself as it was to Baron Parke.

A. M. K.

Principal and Surety: Discharge of Surety by Alteration in Contract between Principal and Creditor.—To the average layman, the following guarantee would probably present no uncertainties or difficulties. "Lend X one hundred dollars, and I will see that you are repaid." The man who made an offer of this character would, we venture to say, without question consider himself bound to the extent of fifty dollars in the event that X availed himself of the guarantee to borrow but fifty. The man lending the money and relying on such a guarantee, would in like manner, think himself perfectly safe in lending the lesser sum, should X request that amount only. Naturally, the greater would include the less; the promise to stand good for one hundred dollars would, of course, make the surety responsible for fifty! The information that the law held the latter free from any liability on the loan and guarantee, would come with equal surprise to creditor and surety. That a suretyship contract is *strictissimi juris* and that the surety has a right to stand upon the very terms of his obligation, would probably be an insufficient and unsatisfactory explanation to the disappointed creditor.

There are abundant dicta to the effect that if the alteration or variation of the terms of his contract is material, the fact that the change is not prejudicial, but, on the contrary, is even beneficial to the surety will not prevent his discharge.¹ The instances in which the courts have actually been called upon to decide this point, however,

⁸ *Islais etc. Water Company v. Allen*, (1901) 132 Cal. 432, 64 Pac. 713; *Johnson v. Taylor*, (1907) 150 Cal. 201, 88 Pac. 903, 119 Am. St. Rep. 181.

¹ E. g. see *Laskey v. Bew*, (1913) 17 Cal. App. Dec. 8; *Gardner v. Walsh*, (1855) 5 El & Bl. 82; *Resse v. U. S.*, (1869) 9 Wall. 13; *Bensinger v. Wren*, (1882) 100 Pa. 500; *City Council v. Ormand* (1897) 51 S. C. 121, 28 S. E. 147; *Zeigler v. Hallahan*, (1904) 131 Fed. 205.